

MEMORANDUM

TO: Board of Environmental Protection

FROM: Michael K. Mullen, Land Bureau, Augusta

DATE: March 10, 1999

RE: Amendment of Chapter 305 Permit by Rule Standards: Post to Hearing

Statutory and Regulatory Reference:

Chapter 305 Permit by Rule Standards ("PBR") is adopted pursuant to general statutory authority at 38 M.R.S.A. Section 341-D(1) and specific authority found in the Natural Resources Protection Act at 38 MRSA Section 480-H.

Location:

The Natural Resources Protection Act and Chapter 305 rules apply to activities affecting protected natural resources in the organized portions of the state.

Description:

A number of the amendments being proposed are required as a result of legislative direction. Some were recommended by a review committee established by the Land and Water Resources Council in response to a legislative resolve (see 1997 Resolves, Chapter 41). These recommended amendments are identified below by **(PBR RC)**. Further, Chapter 240 of Public Laws 1997 required that dredges of more than 50,000 cubic yards obtain an individual permit. It also limited the use of PBR for maintenance dredges to one time only and for only those projects receiving an individual permit within the last 10 years prior to the PBR notification.

The department has also identified a number of areas where the rule should be amended to ensure that only relatively small, discreet projects are authorized. A number of grammatical and wording changes have been made to make the rule conform to the convention used by the Secretary of State's Office (e.g. proper use of "shall" and "may"). The "Notes" have been re formatted for uniformity, some removed that are considered unnecessary, and others made into standards where needed. A number of "Definitions" have been deleted since the terms are no longer pertinent under the current law.

General amendments:

1. Under "Applicability" in most sections, restrictions have been added that ensure the activity complies with other department laws (specifically the Site, Stormwater and NRPA laws) and local shoreland zoning.

2. A new section “Discretionary authority” has been added that allows the department to require an individual permit for an activity qualifying for PBR if it appears that the standards of the NRPA may not be met, significant cumulative impact could occur, or where a special concern for a resource exists.
3. We have moved the before and after photographs requirement to a new “Submissions” section found in all Activity sections.
4. In the Applicability sections, more specific references to freshwater wetlands have been made in keeping with recent NRPA amendments limiting jurisdiction in and around certain wetland types.
5. Section 5 “Moorings” is being officially repealed (we failed to properly do this in the 1995 amendments).
6. Converted a “Note” about handling solid waste properly to a standard requiring that disposal of dredge materials conform with Maine solid waste laws throughout the rule.
7. We deleted the statutory definitions at the end of the Chapter that were inadvertently included as part of the rule and the Table of Contents. However, both will be added to the printed material we distribute for informational purposes.

Sectional amendments:

1) Introduction:

-new Section C(1)(c) prohibits the start of construction of a PBR activity until any Site or Stormwater permits, if needed, have been obtained.

-new Section D provides for discretionary authority to require full review for an activity that qualifies for PBR if it appears that the standards of the NRPA might not be met, significant cumulative impact may occur or impact to a resource of special concern might occur.

2) Soil disturbance:

-exempts from the 14 day waiting period those activities performed by individuals certified by the department in erosion controls measures (i.e. Nonpoint Source Training and Resource Center program)

-allows PBR to apply on steeper slopes, up to 3:1 (was 5:1) but prohibits counting those areas steeper than 3:1 toward the 25 foot setback requirement

-clarifies that any fill generated during structure repair must be removed to at least 25 feet from the resource unless it is required for foundation backfill.

3) Intake pipes:

- if a tidal area involved, requires Dept. of Marine Resources' ("DMR") approval of the timing of construction
- added prohibition on blasting in inundated areas

4) Replacement of structure

- if a tidal area involved, requires DMR approval of the timing of construction
- changes applicability to structures in place 24 months prior to receipt of PBR (to match current law)
- prohibits the replacement of tidal flood gates under PBR (requires individual permit) (**PBR RC**)
- allows reinforcement of retaining walls with facing material less than 6 inches thick
- prohibits replaced structures from interfering with existing recreational/navigational uses (e.g. cannot reduce existing clearance below a replaced culvert or bridge if boat traffic present)

6) Movement of rocks or vegetation

- limits clearing to one area per lot or area under common ownership

7) Outfall pipes

- if a tidal area involved, requires Dept. of Marine Resources' ("DMR") approval of the timing of construction
- added allowance to vary from 25 foot filter strip requirement if, when applicable, it is in conflict with Site or Storm Water permit standards.
- added prohibition on blasting in inundated areas

8) Shoreline Stabilization

- name changed to "Shoreline stabilization" to better encourage vegetative solutions to erosion problems
- allows rip rap to be installed on certain open water wetlands
- allows rip rap in coastal areas for agricultural land protection

- restricts riprap to eroding slopes steeper than 3:1 or other areas below existing outfalls. Requires vegetative stabilization measures otherwise and allows some soil to be brought to site to establish vegetation

- limits the height of riprap on the shore to 2 feet above normal high water line of great ponds, 100 year flood line on rivers streams or brooks, and anticipated wave height on coastal wetlands

- allows DEP to waive engineering requirement for riprap on small streams

9) Utility Crossings

- limits use of PBR to a single submerged crossing of a natural resource (projects consisting of multiple crossings must obtain an individual permit)

- requires DMR, the Atlantic Salmon Authority (“ASA”) and the Dept. of Inland Fisheries and Wildlife (“DIF&W”) approval, submitted with the notification form, for crossings involving trench excavation or bottom disturbance performed between Oct. 2 and July 14 (which correlates with a federal restriction)

- adds a standard requiring a “dry” method for crossings with trench excavation

- added prohibition on blasting in inundated areas

10) Stream crossings

- limits use of PBR to a single crossing of a natural resource

- exempts from the 14 day waiting period those activities performed by individuals certified by the department in erosion controls measures (i.e. Nonpoint Source Training and Resource Center program)

- requires DMR, ASA, and DIF&W approval, submitted with the notification form, for crossings involving trench excavation or bottom disturbance performed between Oct. 2 and July 14 (which correlates with a federal restriction)

- reduced the amount of freshwater wetland allowed to be altered in association with the stream crossing to 25 feet on either side of the stream, not 100 feet as currently allowed

- increased sizing requirement for culverts to carry 25 year flows, increase openings from 2.5 to 3 times the cross sectional area of the stream channel

11. State transportation facilities (repealed and replaced entire section due to numerous changes)

- increased maximum amount of freshwater wetland alteration allowed under this section before becoming subject to Chapter 310 Rules in response to NRPA changes effective fall of 1995 expanding authority to all freshwater wetland areas
- prohibits use of PBR for activities in sand dune systems
- photographs must be taken by the Department of Transportation (“DOT”) and the Maine Turnpike Authority and kept on file for DEP review if needed
- added DMR and the ASA (along with IF&W and Div. Of Environmental Evaluation) to the requirement that agencies’ approvals are needed to *not* improve fish passage where currently impaired for activities involving replacement work in coastal areas
- allows temporary roads in all resources but may not restrict fish passage or cause sedimentation; roads in rivers must pass the stormwater associated with 10 year storms at a minimum
- allows the use of erosion and sedimentation control BMP’s adopted by DOT

12) Restoration of natural areas

- allows the removal of non-native species and reestablishment of natural vegetation
- allows the retrieval of sand from below the normal high water line adjacent to sand beaches on great ponds provided upland erosional causes are eliminated
- if a tidal area involved, requires Dept. of Marine Resources’ (“DMR”) approval of the timing of construction
- if the activity is the removal of a beaver dam, requires proof of IF&W approval to remove the dam

13) Habitat creation or enhancement and water quality improvement activities

- added ‘conservation groups’ and ‘owners of Hydropower projects’ as eligible to perform these activities
- allows landfill closures under this section
- requires submission of proof that natural resource agency will supervise project (excluding landfill closures)

14) Piers, wharves, pilings and haulouts

- allows the construction of “haulouts” for boat retrieval provided it is pinned to ledge or is on piles, does not extend below low water line, no fill is added and bracing does not cause shading
- allows roadways or walkways to be constructed to the pier, wharf or haulout being constructed provided that maximum width is 10 feet and located entirely in upland
- if project located in significant wildlife area, ineligible for PBR
- requires submission of plans for pier, wharf or haulout along with ‘before’ photos
- limited to one pier, wharf or haulout per lot or area of common ownership; if a pier, wharf or haulout already exists, PBR not available for additional structures (**PBR RC**)
- added definitions for “haulout” and “water dependent use”

15) Public boat ramps

- requires submission of an erosion control plan if activity is on a great pond
- requires submission of approval of timing of the construction by either DMR or IF&W, depending on the resource involved

16) Activities in coastal sand dunes

- removed allowance for movement of sand and cobble from the front of buried seawalls (**PBR RC**)
- added a standard for open fence construction per the Sand Dune rules, Chapter 355
- prohibits the movement of any sand seaward of the frontal dune between April 1 and September 1 unless approved by IF&W
- requires that dune restoration occur between March 1 and April 15 and requires specific planting standards
- requires that private walkways be less than 4 feet in width, public walkways may be 10 feet in width; all must allow free movement of sand

17) Transfers and permit extensions

- clarify that section allows transfer of individual, general and tier permits

- requires proof of sufficient expertise and financial resources to complete project if wetland compensation involved

- requires approval of the transfer from permittee

18) Maintenance dredging permit renewal

- restricts use to one time renewal only of an individual NRPA permit

- limits dredge to less than 50,000 cubic yards

- if a tidal area involved, requires Dept. of Marine Resources' ("DMR") approval of the timing of construction

- prohibits disposal of dredge debris or material in wetlands, great ponds, rivers, streams or brooks or significant wildlife habitats unless otherwise allowed by PBR (e.g. for restoration of natural area, dune restoration/construction, etc.)

Environmental issues:

These amendments represent a general strengthening of the PBR process and standards to ensure that projects eligible for PBR are relatively minor in size and potential impact. A number of amendments also represent the concern of stakeholders and the Legislature that resulted from a study of the PBR process and hearings on dredging issues. Specific recommendations from these sources have been incorporated in the draft rule and a number of other proposals are directly related to the concerns expressed in the course of these review efforts.

Department Recommendation:

The department recommends the Board post this rule to hearing on April 14, 1999, at 1:30.

Estimated Time of Presentation:

Approximately 30 minutes. To date, I have not received many questions on this amendment effort so I do not expect many to testify. The hearing should take less than 2 hours at the most.